

Mediators and Substantive Justice: A View from Rawls' Original Position

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ABSTRACT *This article explores substantive justice and mediation from the philosopher John Rawls' concept of the original position. Whether mediators do or should care about substantive justice is a question that continues to bedevil the field, theorists, and practitioners alike. In some parts of the world, opinion leaders and influential trade organizations have weighed in, promulgating ethics codes that, in large part, divest mediators of concern with the substantive justice of the agreements they facilitate. While consideration of a mediator's proper relationship to justice usually revolves around Kantian concerns for disputant autonomy, little attention has been paid to the role of more modern deontologists like John Rawls. This paper argues that as mediation becomes a fixture in a world of ever-increasing inequality, Rawls' central message gains resonance. Rawls' theory of justice held that society should strive toward equality of opportunity and that, where inequality exists, societal rules should be formulated to advantage the least resourced among us. In our view, mediation's ethical codes should be structured to protect the least advantaged of mediation's participants.*

In an effort to bring Rawls into the dialogue on mediation ethics, this essay places the mediation participant in the original position and asks how he or she might approach issues of substantive justice in a mediation process. It surveys, briefly, a number of ethics codes drawn from different regions in the world and notes that different jurisdictions have struck different balances regarding the mediator's relationship to justice. We ask, what would a code drafted by mediation enthusiasts operating under the "veil of ignorance" look like? And, given mediation's use in dispute contexts characterized by unequal distributions of power, why doesn't Rawls' theory of justice hold more sway?

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what to do, how does your mediator differ from standard conceptions
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I. INTRODUCTION

In his runaway bestseller, *The World is Flat*, New York Times columnist, Thomas Friedman, described a global landscape leveled and knit together by lightning fast fiber-optics, open source software and global supply chains.¹ Citing the growing trends of uploading, outsourcing, and off-shoring, Friedman describes a world where information, ideas, money,

¹ THOMAS FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (1st ed. 2005).

and opportunity travel freely, unimpeded by political or geographic barriers.² Friedman's flat world, however, was not recognizable to some commentators, who witness, instead, a more vertiginous economic topography: a "spiky" world where, "the tallest peaks—the cities and regions that drive the world economy—are growing ever higher, while the valleys mostly languish."³ An interesting analogy could be drawn to mediation's broad march across the globe and the implications of that march on questions of social justice.⁴

Mediation continues to be a growth industry, both in developing nations and developed economies. As an alternative to traditional adversary forms, mediation has established a beachhead in virtually every region around the globe. Movement into previously uncharted subject matter areas parallels this geographic expansion. Parties who, in earlier times, would most certainly have pled their case before a judge, find themselves embarked instead on facilitated negotiations.

That this growth is taking place in a period that some have dubbed "the New Gilded Age"⁵ requires a reexamination of mediation's ethical canon. This canon has been shaped in large part by two aspects of the field's identity: (1) the conviction that procedures structured to maximize autonomous decision-making will yield maximally fair outcomes and (2) postmodern skepticism regarding the existence of universal public values and objective, verifiable "truths." These two intellectual and moral commitments have led to a set of ethical mandates centered almost entirely on party self-determination and a conception of justice that is almost entirely procedural rather than substantive.

The question of substantive justice and whether a mediator can or should be held accountable for the fairness of the mediated outcome remains hotly debated and unsettled.⁶ This lack of consensus is apparent both from a

² *Id.* at 51–199.

³ Richard Florida, *The World is Spiky*, ATLANTIC, Oct. 2005, at 48, 48.

⁴ Robert A. Baruch Bush & Joseph P. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 OHIO ST. J. ON DISP. RESOL. 1, 3 (2012) (defining social justice to mean "a state of affairs in which inequalities of wealth, power, access, and privilege—inequalities that affect not merely individuals but entire classes of people—are eliminated or greatly decreased.").

⁵ See David B. Grusky & Tamar Kricheli-Katz, *Poverty and Inequality in a New World, Introduction to THE NEW GILDED AGE: THE CRITICAL INEQUALITY DEBATES OF OUR TIME I* (David B. Grusky & Tamar Kricheli-Katz, eds. 2012).

⁶ See Omer Shapira, *Conceptions & Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281, 284–90 (2012) (describing a myriad of sometimes conflicting conceptions of fairness in mediation literature); Elad Finkelstein & Shahar Lifshitz, *Bargaining in the Shadow of the Mediator: A Communitarian Theory of Post-Mediation*

review of the academic literature as well as a sampling of authoritative ethical codes and standards. The codes we review universally require mediators attend to party self-determination and mediator impartiality, but split in their assessment as to whether mediators have any responsibility for the substantive fairness of the agreements they help create. We contend that mediators should attend to the substantive fairness of the agreements they foster and use John Rawls' theory of justice for support. We apply Rawls' concept of the "original position" to the formulation of ethical codes for mediators, and conclude that Rawls' arguments imply enhanced accountability for outcome fairness, operationalized in ways that do not unduly trench on other important mediation values.

Our argument proceeds in four parts: In part two, we set mediation's increasing global expansion within the context of rising income and wealth inequality; part three reviews the rich and contentious literature surrounding mediation's relationship with substantive justice and mediator accountability for outcome fairness; and part four discusses five ethics codes from mediation-friendly regions throughout the world and examines their divergent treatment of mediator role and accountability for substantive fairness. Our last part asks what ethical responsibilities would a mediation participant cloaked in Rawls' "veil of ignorance" ascribe to her mediator? If, according to Rawls, societal structures should be organized in ways that benefit the least advantaged, how might that insight be translated to the formulation of ethical mandates in mediation? We conclude by suggesting that an exclusive focus on party self-determination, while institutionally pragmatic, provides too little in the way of party protection and offers too little ethical ballast in a world of pervasive extra-legal disputing and profound inequality.

II. MEDIATION'S REACH AND GROWING INEQUALITY

As an institutionalized alternative to costly and cumbersome judicial procedures, mediation has enjoyed considerable popularity in the United States, England, Canada, and Australia for several decades. In each of these countries, mediation receives support from courts at all levels seeking to reduce backlog, streamline dockets, and improve efficiency.⁷ Mediation

Contracts, 25 OHIO ST. J. ON DISP. RESOL. 667 (2010) (arguing for enhanced regulation to ensure the fairness of post-mediation contracts).

⁷ See NADJA ALEXANDER, *INTERNATIONAL COMPARATIVE MEDIATION: LEGAL PERSPECTIVES* 53, 55 (1st ed. 2009); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Our Legal System*, 108 PENN

practice in Europe received a boost from the EU Parliament's 2008 passage of the Mediation Directive, which encouraged member states to use commercial mediation for cross-border disputes and had the subsidiary effect of catalyzing member nations' domestic programs.⁸ In response to the directive, Ireland's Law Reform Commission proposed new mediation-enabling legislation.⁹ Italy adopted a mandatory mediation requirement for litigants in a diverse array of suits.¹⁰

ST. L. REV. 165 (2003) (an overview of alternative dispute resolution in the United States); Joel Richler, *Court-Based Mediation in Canada*, 50 JUDGES' J. 14 (2011) (an overview of the Canadian alternative dispute resolution system); NEIL ANDREWS, THE THREE PATHS OF JUSTICE: COURT PROCEEDINGS, ARBITRATION AND MEDIATION IN ENGLAND 187, 193–94 (2012) (noting the increasing use of mediation in England); AUSTRALIAN GOV'T ATTORNEY-GENERAL'S DEP'T, A STRATEGIC FRAMEWORK FOR ACCESS TO JUSTICE IN THE FEDERAL CIVIL JUSTICE SYSTEM (2009), <https://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf>; Lucille M. Ponte, *Reassessing the Australian Adversarial System: An Overview of Issues in Court Reform and Federal ADR Practice in the Land Down Under*, 27 SYRACUSE J. INT'L L. & COM. 335 (2008) (an overview of the reforms made to the Australian justice system and their incorporation of alternative dispute resolution); CENTRE FOR EFFECTIVE DISPUTE RESOLUTION, THE SIXTH MEDIATION AUDIT (2014), <http://www.cedr.com/docslib/TheMediatorAudit2014.pdf> (a survey of civil and commercial mediators indicates that mediation increased 9% from previous audit in 2012).

⁸ Jacqueline M. Nolan-Haley, *Is Europe Headed Down the Primrose Path With Mandatory Mediation?*, 37 N.C. J. INT'L L. & COM. REG. 981, 989 (2012) (an overview of the EU's Mediation directive).

⁹ *Alternative Dispute Resolution: Mediation and Conciliation*, LAW REFORM COMMISSION (Nov. 2010), http://www.lawreform.ie/_fileupload/reports/r98adr.pdf.

¹⁰ See Francesca De Paolis, *Italy Implements Mandatory Pre-Trial Mediation in Civil and Commercial Matters*, 65 DISP. RESOL. J. 16 (2010). It should be noted that Italy's mandatory mediation law has traversed a rocky road toward implementation. In December 2012, Italy's Constitutional Court suspended this law declaring it an unconstitutional denial of access to justice. See Sonya Leydecker, Alexander Oddy & Anita Phillips, *Italy's Constitutional Court Rules Mandatory Mediation Unconstitutional*, LEXOLOGY (Nov. 5 2012), <http://www.lexology.com/library/detail.aspx?g=855928ac-b90e-45ff-b764-ad1b75c3836a>. The law was substantially rewritten and re-enacted and now contains an opt-out provision whereby attorneys and their clients can withdraw from mediation at an early stage. Incentives were included, however, to encourage parties to continue in the process. Where a party is considering withdrawal, the mediator may propose a solution to the dispute. If it is rejected and the case goes to trial, the judge may shift onto the rejecting party all mediation and litigation costs, if the judgment is consistent with the mediator's proposal. See Martin Svatos, *Mandatory Mediation Strikes Back*, MEDATE (Nov. 2013), <http://www.mediate.com/articles/SvatosM1.cfm>.

Other EU members eschewed the controversies associated with requiring disputant participation, but instead dangled financial incentives before uncertain litigants. In both Bulgaria and Romania, parties who resolve their dispute in mediation can expect a partial or complete refund of their filing fees.¹¹

The push to increase mediation's use extends beyond first-world borders. As others have noted, Western-style mediation has become a near ubiquitous cultural export.¹² Initiatives funded by Agencies such as USAID (United States Agency for International Development), AUSAID (Australian Agency for International Development), the World Bank, and the American Bar Association, have sought to plant the mediation seed in such far-flung soil as, Thailand, Tonga, Albania, Bahrain, Nigeria, Papua New Guinea, and Malaysia.¹³ Whether these seeds are taking root in the manner intended remains questionable,¹⁴ but the expansionist impulse continues.¹⁵

¹¹ See Ekaterina Dimcheva, *Mediator Country Report: Bulgaria*, JAMS INT'L ADR CTR. http://www.adrcenter.com/jamsinternational/civil-justice/Mediation_Country_Report_Bulgaria.pdf (last visited Mar. 4, 2016) (discussing reimbursement of court fees at Art. 78, paragraph 9 of the Civil Procedure Code); Constantin Adi Gavrilă, *Breaking Down the Romanian Mediation Law*, JAMS ADR BLOG (Apr. 26, 2012), <http://jamsadrblog.com/2012/04/26/breaking-down-the-romanian-mediation-law/>.

¹² See Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295 (2006) (discussing how U.S.-led aid programs, particularly those aiming to establish or reestablish the rule of law in developing or transitional states, employ mediation as a foundational element).

¹³ CENTRE FOR DEMOCRATIC INSTITUTIONS, THAI GOOD GOVERNANCE PROGRAM: MEDIATION TRAINING AND TRAIN THE TRAINERS, BANGKOK (2000), http://archives.cap.anu.edu.au/cdi_anu_edu_au/CDIwebsite_1998-2004/thailand/thailand_downloads/ThaiMediationReport.pdf. See AUSAID, AUSTRALIAN AGENCY FOR INTERNATIONAL DEVELOPMENT ANNUAL PROGRAM PERFORMANCE REPORT 2008-2009 (2009) (in Tonga, the Pacific Governance Support Program, Tonga was also funded by AusAID to provide alternative dispute resolution training). See also Press Release, USAID, Usaid Supports Court Mediation in Albania (Apr. 22, 2011), <http://www.usaid.gov/news-information/press-releases/usaid-supports-court-mediation-albania> (USAID-funded initiatives assist development of mediation in Albania); WORLD BANK GROUP, MEDIATION HELPS RESOLVE BUSINESS DISPUTES IN PAPUA NEW GUINEA (2012), <https://www.wbginvestmentclimate.org/advisory-services/regulatory-simplification/debt-resolution-and-business-exit/upload/Mediation-Helps-Resolve-Business-Disputes-in-Papua-New-Guinea.pdf>.

¹⁴ See Fatahillah A. Syukar & Dale M. Bagshaw, *Court-Annexed Mediation in Indonesia: Does Culture Matter?*, 30 CONFLICT RESOL. Q. 369, 369 (2013).

¹⁵ See Laura Nader & Elisabetta Grande, *"From the Trenches to the Towers" Current Illusions and Delusions About Conflict Management—In Africa and Elsewhere*, 27 L. & SOC. INQUIRY 573, 591 (2002).

MEDIATORS AND SUBSTANTIVE JUSTICE

Mediation's migration into new geographic regions has been accompanied by a shift into new subject matter terrain. Once primarily a creature of industrial trade or community relations, mediation is now an institutionally encouraged¹⁶ procedural step in both civil and criminal contexts.¹⁷ The use of mediation in patent infringement, human rights violations, housing foreclosure, attorney discipline, and end of life decision-making underscores the process's incursion into species of conflict that would earlier have been reserved for more formal modes of dispute processing.¹⁸ If, in the 1960s and '70s, mediation was confined to collective bargaining negotiations,¹⁹ neighbor-neighbor disputes,²⁰ and the rare "hippie" divorce,²¹ today, it is equally likely that the process will be invoked in

¹⁶ See Nolan-Haley, *supra* note 8, at 999–1009 (in some jurisdictions, mediation is not voluntary but rather mandated by judicial authority).

¹⁷ See Maureen E. Laflin, *Criminal Mediation Has Taken Root in Idaho's Court*, 56 ADVOCATE 37, 37 (2013); Gabriel H. Teninbaum, *Easing the Burden: Mediating Misdemeanour Criminal Matters*, 62 DISP. RESOL. J. 63, 66 (2007) (discussing demonstrated success of Washington D.C. misdemeanour mediation program). See also CAL. PENAL CODE § 14152 (West 2011) (allows the District Attorney to refer misdemeanour cases to community conflict resolution programs). See also AUSTRALIAN GOV'T ATTORNEY-GENERAL'S DEP'T, *supra* note 7; Robert Hulls, ATTORNEY-GENERAL'S JUSTICE STATEMENT 2 (2008).

¹⁸ See WIPO Arbitration and Mediation Center, *Update on the WIPO Arbitration and Mediation Center's Experience in the Resolution of Intellectual Property Disputes*, 44 LES NOUVELLES 49 (2009). See generally Heather S. Kulp & Jennifer Shack, *A (Mortgage) Crisis in Communication: Foreclosure Dispute Resolution as Effective Response?*, 66 ARK. L. REV. 185 (2013) (discussing the effectiveness of foreclosure ADR programs in Connecticut, Nevada, Ohio, Pennsylvania, and other states); Mary Patricia Benz, *The Mediation Option for Attorney Discipline Cases: Are Some Disciplinary Cases Good Candidates For Mediation? This Lawyer-Mediator Says "Yes"*, 98 ILL. BUS. J. 262 (2010) (discussing the use of mediation programs to facilitate resolutions to attorney discipline cases leading to better outcomes and a more positive perception from the public); Glenn Cohen, *Negotiating in the Shadow of Death*, 11 DISP. RESOL. MAG. 12 (2004) (discussing ADR's capacity to resolve conflicts surrounding end-of-life decisions quickly and more effectively than traditional litigation).

¹⁹ See JAMES J. ALFINI ET AL., *MEDIATION THEORY AND PRACTICE* 1 (2d ed. 2006) (discussing development following World War II of the Federal Mediation and Conciliation Service, whose mandate is to provide mediation services to private sector union and management personnel engaged in collective bargaining).

²⁰ See generally THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES (Sally E. Merry & Neil Milner eds., Univ. Mich. Press 1993).

²¹ See generally O.J. COOGLER, *STRUCTURED MEDIATION IN DIVORCE SETTLEMENT: A HANDBOOK FOR MARITAL MEDIATORS* (1978) (divorce mediation was still an experimental innovation in the late 1970s when therapist O.J. Coogler began working

violent domestic disputes in Indonesia,²² eve-of-foreclosure talks between struggling mortgagees and banks in Ireland,²³ and injured medical malpractice victims seeking redress in Malaysia.²⁴

Mediation's global ubiquity must be assessed in the context of growing inequality between the haves and the have-nots. Discussion of the decline of the middle class and the rise of modern-day plutocrats has moved beyond the lecture halls of academic economists and into mainstream news outlets and political stump speeches. We live in a modern-day Gilded Age.²⁵ In the United States, income gains and wealth accumulation at the top and bottom segments of the socioeconomic pyramid are diverging at rates not seen since the 1920s.²⁶ Between 1979 and 2007, the incomes of the top 1% of the population grew by 275% while the incomes of the middle class rose less than 40%.²⁷ Comparative assessments of wealth are even starker. The top 20% of American households garners 87.2% of the nation's wealth, while the bottom 40% of households is effectively unable to accumulate wealth at all.²⁸ Studies of social mobility reveal that life horizons are profoundly shaped by

with separating couples who wished to bypass the hostilities occasioned by the adversary system).

²² See *Tackling Domestic Violence in Indonesia's Papua Province*, IRIN (Dec. 13, 2013), <http://www.irinnews.org/report/99331/tackling-domestic-violence-in-indonesia-s-papua-province> (discussing the prevalence of domestic violence in this region and identifying various processes, including mediation, used to resolve such disputes).

²³ See Mark Paul, *AIB Agrees 120 Mortgage Deals, Including Write-Down*, IRISH TIMES (Feb. 3, 2014), <http://www.irishtimes.com/business/financial-services/aib-agrees-120-mortgage-deals-including-write-down-1.1676937> (discussing pilot mediation program in Ireland that settled roughly 120 bank-mortgagee disputes. According to the report "[a]bout 26 of the deals involved the property being sold or surrendered. About half of those involved got the remaining debt completely written off. The rest involved monthly payments on the residual debt, following sale, for up to seven years.").

²⁴ See Tan Shioh Chin, *Opting for Mediation*, STAR ONLINE (Dec. 16, 2012), <http://www.thestar.com.my/story/?file=%2F2012%2F12%2F16%2Fhealth%2F12288851&sec=health> (Medical Defense Malaysia, a medical defense organization as well as Medico Legal Society of Malaysia are both encouraging medical malpractice plaintiffs to take their cases to mediation instead of the courts).

²⁵ See THE NEW GILDED AGE: THE CRITICAL INEQUALITY DEBATES OF OUR TIME (David Grusky & Tamar Kricheli-Katz eds., Stanford Univ. Press 2012).

²⁶ See THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 237–376 (Arthur Goldhammer trans., 2014).

²⁷ See ROB REICH & DEBRA SATZ, *Ethics and Inequality*, in OCCUPY THE FUTURE 47, 47 (David B. Grusky et al. eds., 2013).

²⁸ See David Grusky & Erin Cumberworth, *Economic Inequality in the United States: An Occupy-Inspired Primer*, in OCCUPY THE FUTURE 13, 17 (David B. Grusky et al. eds., 2013).

parental class, education, and income.²⁹ Income inequality skews opportunity and dampens intergenerational mobility.³⁰ Moreover, education, a perceived escape route from privation, is largely failing to transport those not already born to some advantage. In 1984, the children of the top quintile of earners were 75% more likely to graduate from college than the bottom quintile. In 1993, that number stood at a stubborn 69.5%. As growth and the rewards from labor slow, accumulated capital and inheritance play a greater role.³¹ Movement up the socioeconomic ladder from one generation to the next is slow and limited. The class into which we are born exerts a greater gravitational pull than our rhetoric of equal opportunity would allow.³²

Inequality is increasing in most economies throughout the globe. The Gini coefficient, a measurement tool developed by an Italian statistician in the early twentieth century, measures trends toward equality or inequality of income and wealth distribution, with 0 representing complete equality and 1 representing complete inequality.³³ Between 1990 and 2010, the Gini coefficient for disposable income increased in nearly all European economies.³⁴ Inequality also rose in most economies in Asia and the Pacific, the Middle East, and North Africa.³⁵ If one were to rank the world's nations according to where they fall on the spectrum of inequality, South Africa and Namibia would lead the pack with Gini coefficients of 60 and above. Brazil, Bolivia, Colombia, and several other Latin American countries would come

²⁹ See Raj Chetty et al., *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, 104 AM. ECON. REV. 141, 141–47 (2014). See also Janny Scott & David Leonhardt, *Shadowy Lines that Still Divide*, N.Y. TIMES, May 15, 2015 (“Because income inequality is greater here, there is a wider disparity between what rich and poor parents can invest in their children. . . . ‘Being born in the elite in the U.S. gives you a constellation of privileges that very few people in the world have ever experienced Being born poor in the U.S. gives you disadvantages unlike in Western Europe and Japan and Canada.’”).

³⁰ See Miles Corak, *Income Inequality*, 27 J. ECON. PERSP. 79, 79–102 (2013).

³¹ PIKETTY, *supra* note 26, at 377–78 (arguing that “Whenever the rate of return on capital is significantly and durably higher than the growth rate of the economy, it is all but inevitable that inheritance (of fortunes accumulated in the past) predominates over saving (wealth accumulated in the present) Almost inevitably, this tends to give lasting disproportionate importance to inequalities created in the past, and therefore to inheritance.”).

³² See NORMAN DANIELS ET AL., *IS INEQUALITY BAD FOR OUR HEALTH?* (Joshua Cohen & Joel Rogers eds., 2000); JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY’S DIVIDED SOCIETY ENDANGERS OUR FUTURE* (2012).

³³ See BRANKO MILANOVIC, *THE HAVES AND THE HAVE-NOTS: A BRIEF AND IDIOSYNCRATIC HISTORY OF GLOBAL INEQUALITY* 29–30 (2011).

³⁴ See IMF, *Fiscal Policy and Income Inequality*, IMF Policy Paper (2014).

³⁵ *Id.* at 7.

in a close second with Gini coefficients hovering around 56. China, India, and a few select countries in Asia, such as Malaysia and Thailand, would rank next with Gini coefficients estimated at 50–54, and the United States and Russia would follow closely behind with coefficients of 49 and 42 respectively.³⁶ Given that economists perceive wealth dispersion in both Russia and the United States to be at dangerously skewed levels, it is clear that in many regions throughout the world, the problem of inequality is creating a code-red situation.³⁷

To date, mediation scholars have paid scant attention to whether mediation's methods and goals should respond to this new economic reality. A few vocal critics aside, the mediation community has largely viewed inequality in the world as simply part of the substrate within which the mediator works. Inequality is a fact to be accepted and managed, but not challenged or remediated. In the words of one scholar-practitioner, "[M]ediators do not encourage the lamb to stand up to the lion; rather the imbalance created by the lion's strength and the lamb's vulnerability is part of the setting within which the parties and the mediator negotiate."³⁸ In the next section, we review these debates by examining the different definitions of justice that mediation advocates and critics hold and how those definitions lead to different conclusions regarding the scope and limits of the mediator's role.

III. MEDIATION'S PROGRESSIVE OR REGRESSIVE RELATIONSHIP TO JUSTICE: THE DEBATES

Almost from its very inception as a modern dispute resolution method, critics have argued that mediation is antithetical to justice. The first wave of mediation detractors were left-leaning social justice activists who viewed

³⁶ See GÖRAN THERBORN, *THE KILLING FIELDS OF INEQUALITY* 115 (2013).

³⁷ *Id.* at 8 (noting correspondence between the rapid rise of the Gini coefficient in Russia in the early 1990's and an increase in death rates and decrease in life expectancy."). See also *id.* at 11–12 (noting that the affluent and well educated in East-Central Europe, Hungary, Lithuania, Estonia and Poland enjoy a longer life expectancy rate than those limited to a primary education).

³⁸ See Howard Bellman, *Mediation as an Approach to Resolving Environmental Disputes*, Environmental Conflict Practitioners Workshop, Proceedings (1982)) (defending mediator neutrality on the grounds that after the mediation, the lion remains a lion, the lamb remains a lamb, and the mediator's job is to "make the lion-lamb relationship clear to the lamb.") (cited by Bush & Folger, *supra* note 4, at 31).

informal justice as another form of state oppression.³⁹ These critics saw mediation functioning as a negative force in three distinct ways: intrusion, individuation, and diffusion. By insinuating itself into the formerly private spaces of community and domestic life, mediation extended the reach of a tyrannical state.⁴⁰ By characterizing disputes as interpersonal scuffles, driven by emotion and idiosyncratic tensions, mediation individuated conflict, obfuscating its economic or political features.⁴¹ And by tamping down the flares of righteous discontent, mediation diffused and siphoned off the

³⁹ JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 136 (1983) (“[C]ompromise only is an equitable solution between equals; between unequals, it ‘inevitably reproduces inequality.’”); Laura Nader, *When is Popular Justice Popular*, in *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES* 435 (Sally E. Merry & Neil Milner eds., Univ. Mich. Press 1993) (arguing that “‘popular justice’ movements are not usually popular, in the sense of being locally controlled or bottom-up in origin, but rather movements that originate in centers of power and then try to connect with local populations for purposes of control.”); Richard L. Abel, *The Contradictions of Informal Justice*, in *THE POLITICS OF INFORMAL JUSTICE, VOLUME 1: THE AMERICAN EXPERIENCE*, 267, 270–80 (Richard L. Abel ed., Acad. Press 1982); Christine B. Harrington, *Voluntariness, Consent and Coercion in Adjudicating Minor Disputes: The Neighborhood Justice Center*, in *POLICY IMPLEMENTATION: PENALTIES OR INCENTIVES?* 131 (John Brigham & Don W. Brown eds., Sage Publications 1980).

⁴⁰ See Richard Hofrichter, *Neighborhood Justice and the Social Control Problems of American Capitalism: A Perspective*, in *THE POLITICS OF INFORMAL JUSTICE, VOLUME 1: THE AMERICAN EXPERIENCE*, 207, 237 (Richard L. Abel ed., Acad. Press 1982). (“The expansion of state power—the regulation of the totality of social existence—is manifested in the subject matter deemed appropriate for resolution in NJC’s [(Neighborhood Justice Centers)]. Because [NJC]s handle cases concerned not only with violations of law but also with behavior identified as a social problem or a threat to community stability, the range of control is greatly extended”); Christine B. Harrington, *Delegalization Reform Movements: A Historical Analysis*, in *THE POLITICS OF INFORMAL JUSTICE, VOLUME 1: THE AMERICAN EXPERIENCE* 35, 52 (Richard L. Abel ed., Acad. Press 1982).

⁴¹ See Judy H. Rothschild, *Dispute Transformation, The Influence of a Communication Paradigm of Disputing, and the San Francisco Community Boards Program*, in *THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES*, at 265–66 (Sally E. Merry & Neil Milner eds., Univ. Mich. Press 1993) (arguing that the San Francisco Community Boards adopted a “communication paradigm of disputing” that leads to an emphasis on the relational aspect of conflicts and neglects the social, legal, and economic dimensions of disputes). See also Harrington, *supra* note 39; Harrington, *supra* note 40, at 62 (describing Neighborhood Justice Centers as part of a large decentralization movement that reduces problems like “violence against women, neighborhood quarrels, and landlord tenant problems” to “individual problems. The origins of these disputes are depoliticized or ignored, and the resolutions . . . internalized by the individualized form of participation.”).

reforming energy of consumers, workers, and other aggrieved groups.⁴² For many of these early activists, the state was the enemy, the goal was to reshape an oppressive capitalist order into softer socialist forms, and community organizing and collective political action was the way forward.⁴³ Informal justice was viewed as a method for securing the quiescence of the poor and marginalized and maintaining the power base of social and political elites.⁴⁴

The second wave of mediation skeptics held very different assumptions. Their critique emanates from a fundamentally more benevolent view of the state and its potential to liberate, civilize and uplift.⁴⁵ According to this view, mediation's menace lies not in its capacity to bring the state's tentacles into previously private spaces, but in its dampening effect on the commonwealth's ability to articulate and enforce morally desirable public norms. Owen Fiss, the most celebrated expositor of this view, descried the ADR movement's focus on the satisfaction of private interests over the elaboration and instantiation of public values.⁴⁶ The task of the judge, Fiss

⁴² See Christine B. Harrington, *Community Organizing Through Conflict Resolution*, in THE POSSIBILITY OF POPULAR JUSTICE: A CASE STUDY OF COMMUNITY MEDIATION IN THE UNITED STATES, 401, 429 (Sally E. Merry & Neil Milner, eds., Univ. Mich. Press 1993) (explaining that to the extent that the ethos of individualism replaces that of empowering a community for the purpose of redistributive social change, neopopulist movements like SFCB will break from "authentic" or "genuine" populism."); Abel, *supra* note 39, at 267, 286 ("[A]dvocates of informalism identify culture as the genesis of significant social problems—not capitalism, class struggle, racism, sexism, or autocratic power. . . . [They] deny the existence of basic cleavages in American society and seek to restore a consensus they locate in the silent fifties by exhorting grievants to moderate their demands.").

⁴³ See Hofrichter, *supra* note 40, at 267; Harrington, *supra* note 42, at 401; Nader, *supra* note 39, at 435; Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Reform Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1 (1993).

⁴⁴ Abel, *supra* note 39, at 296.

⁴⁵ See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). See also Harry Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668 (1986); Judith Resnick, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987); Judith Resnick, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 212 (1995).

⁴⁶ See Fiss, *supra* note 45, at 1082, 1085 ("The dispute-resolution story trivializes the remedial dimensions of lawsuits and mistakenly assumes judgment to be the end of the process. It supposes that the judge's duty is to declare which neighbor is right and which wrong" Fiss then explained, "[T]he purpose of adjudication . . . is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.").

asserted, was not simply to settle a private dispute, but to give force to society's moral commitments as embodied in authoritative texts. School desegregation cases might settle quietly and on terms that satisfy individual litigants, but the resolution would not reaffirm the importance and necessity of racial equality. Informal dispute mechanisms deprive courts and other public bodies the opportunity to provide normative guidance on unsettled social questions and invite parties to evade the legal principles that, in Fiss' view, define a society and give it its identity and "inner coherence."⁴⁷

Underlying the anxiety of Fiss and his fellow "litigation romantics" is the conviction that something we can identify as substantive justice exists and that it is embodied in the rule of law.⁴⁸ They maintain that substantive justice is achieved when authoritative public bodies articulate and apply norms predictably, consistently, and equally regardless of the race, creed, color, or socioeconomic status of the litigants.⁴⁹ These romantics assumed that legal norms worked in favor of social justice and they wanted those norms in play when Americans came together to work out questions of who is owed what from whom. Fiss and his fellow travelers pointed to the reforms of the civil rights, labor, and feminist movements to demonstrate that courtrooms had become friendlier venues for those on the bottom rungs of

⁴⁷ See Owen M. Fiss, *Foreword to The Forms of Justice*, 93 HARV. L. REV. 1, 11, 14 (1979) ("The values embodied in such non-textually-specific prohibitions as the equal protection and due process clauses are central to our constitutional order. They give our society an identity and inner coherence—its distinctive public morality. . . . The task of a judge, then, should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated."). Fellow ADR skeptic, Judge Edwards, pointed out in a related caution that in many cases—for example the civil rights struggles in the South and other regions—local norms and customs were at odds with formal law's insistence on the cherished value of equal protection. See Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 HARV. L. REV. 668, 679 (1986) ("One essential function of law is to reflect the public resolution of . . . irreconcilable differences; lawmakers are forced to choose among these differing visions of the public good. A potential danger of ADR is that disputants who seek only understanding and reconciliation may treat as irrelevant the choices made by our lawmakers and may, as a result, ignore public values reflected in rules of law.").

⁴⁸ See discussion, *supra* note 47. See also Judith Maute, *Public Values and Private Justice: A Case for Mediator Accountability*, 4 GEO. J. LEGAL ETHICS 503 (1991).

⁴⁹ See Geoffrey C. Hazard & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42 (1988) (private justice should embody important characteristics of the public system of justice); David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO. L. J. 2619, 2631 (1995) ("Fiss insists that the unique genius of the courts is their twin requirements of independence and dialogue. Independence guarantees an impartial use of reason, and dialogue guarantees that courts must listen to all comers and reply with reasoned opinions.").

American society. They did not want to see vulnerable disputants shunted into forums where those recently earned legal endowments would not hold sway.⁵⁰ Power imbalances, which could be managed and contained in formal legal proceedings, appeared particularly threatening in the freewheeling, normative tabula rasa that mediation presents.

The mediation community has generated a number of responses to both first wave and second wave attacks. The first wave “social control” critique has itself been dismissed as highly theoretical and insufficiently grounded in actual assessments of how mediation works. Professor Amy Cohen, in examining claims that the export of Western style ADR necessarily results in the “flourishing of hegemonic colonial forms,” counters with descriptions of mediation projects that are highly political and encourage collective action.⁵¹ Similarly, legal sociologist, Patrick Stuart, drew from his study of housing cooperatives to conclude that “communal justice within employee work groups, neighborhood residence groups, mutual support, and self-help groups, . . . are likely to do more to modify the shape of capitalist legality than the collective justice of cooperatives, communes, and other more socialistically oriented orders”⁵²

The response to second wave attacks has taken several forms. Some negotiation enthusiasts sided with Fiss with regard to “significant cases” involving “deep moral disagreement,” but maintained that more ordinary

⁵⁰ See Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991) (discussing how cultural assumptions about women can present disadvantages in mediation); Richard Delgado et al., *Fairness and Formalities: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (discussing how the informal nature of mediation and other forms of dispute resolution may allow racial and ethnic prejudice to influence outcomes to the detriment of minorities); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992) (discussing how mediation places men in a dominant position in divorce mediation); Kathy Mack, *Alternative Dispute Resolution and Access to Justice for Women*, 17 ADEL. L. REV. 123 (1995); Mary Anne Noone, *ADR, Public Interest and Access to Justice*, 37 MONASH U. L. REV. 57 (2011). See also MARIA KARRAS ET AL., LAW AND JUSTICE FOUNDATION OF NEW SOUTH WALES, ON THE EDGE OF JUSTICE: THE LEGAL NEEDS OF PEOPLE WITH MENTAL ILLNESS IN NSW (2006); Frances Gibson, *Alternative Dispute Resolution in Residential Tenancy Cases*, 18 AUSTRAL. DISP. RESOL. J. 101 (2007).

⁵¹ Amy J. Cohen, *Debating the Globalization of U.S. Mediation: Politics, Power, and Practice in Nepal*, 11 HARV. NEGOT. L. REV. 295 (2006) (discussing how U.S.-led aid programs, particularly those aiming to establish or reestablish the rule of law in developing or transitional states employ mediation as a foundational element).

⁵² Henry Stuart, *Community Justice, Capitalists Society and Human Agency: The Dialectics of Collective Law in THE LAW AND SOCIETY READER* 101 (Richard L. Abel ed., N.Y. Univ. Press 1995).

cases could be disposed of in mediation.⁵³ Others agreed that litigation may, but need not always, work to affirm public values, while asserting that mediation can serve important norm-affirming functions as well.⁵⁴ Still others simply concede that mediation is a suboptimal process for securing justice as embodied in legal rights and entitlements, but note that the process has other virtues.⁵⁵

The most radical response turns traditional understandings of justice on its head by denying both the existence of universal values and their embodiment in the rule of law. Although not explicitly or unanimously declared, many mediation advocates are value skeptics, doubtful that absolute moral verities exist.⁵⁶ They approach disputes not as contests between right and wrong or more or less ethically correct viewpoints, but as instances where party interests, narratives, or understandings have not been sufficiently explored, fractionated, and aligned.⁵⁷ They tend to be moral pluralists who survey the divergent moral commitments that animate different cultures and conclude that what constitutes justice is both culturally and temporally contingent.⁵⁸ As Fisher, Ury, and Patton explained in their best-selling book, *Getting To Yes*, truth is not a distinct ontological state but rather “an argument—perhaps a good one, perhaps not—for dealing with . . . difference.”⁵⁹

Mediators’ skepticism extends to the relationship between legal norms and substantive justice. For many mediation scholars, there is little correlation between positive law and intuitions of justice. Joseph Stulberg, in an article entitled *Mediation and Justice: What Standards Govern?*, makes

⁵³ See Robert Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* 107 (2004) (noting that some cases should not settle, including cases in which “a party has a strong desire to create a lasting legal precedent”); Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 60 (1994).

⁵⁴ See J. R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881 (2004).

⁵⁵ Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 1 J. DISP. RESOL. 1 (2007).

⁵⁶ See Dale Bagshaw, *The Three M’s-Mediation, Postmodernism and the New Millennium*, 18 MEDIATION Q. 205–20 (2001).

⁵⁷ GERALD MONK & JOHN WINSLADE, NARRATIVE MEDIATION: A NEW APPROACH TO CONFLICT RESOLUTION 31–56 (2000).

⁵⁸ KEVIN AVRUCH, CONTEXT AND PRETEXT IN CONFLICT RESOLUTION; CULTURE, IDENTITY, POWER, AND PRACTICE (2012); Peter W. Black and Kevin Avruch, *Cultural Relativism, Conflict Resolution, Social Justice*, <http://www.gmu.edu/programs/icar/pcs/BlackAvruch61PCS.html> (last visited Feb. 22, 2016).

⁵⁹ ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 22 (2d ed. 1991).

the point that “simply because something is required by the ‘law’ or the ‘organizational rule’ does not mean ‘justice’ has been secured, even if a judge applies those rules uniformly and consistently.”⁶⁰ Moreover, “It is possible that positive laws appear on their face to be fair but the manner in which they are applied can generate morally perverse—and unjust—outcomes.”⁶¹

Stulberg’s perspective builds on two assumptions widely shared within the mediation community. First, legal rules, far from embodying sacred social ideals, are morally neutral road signs that simply organize the chaotic traffic of human interaction. Second, generalized rules formulated by remote authorities, even if sensible in the abstract, often do mischief when applied to the particularized circumstances of distinct groups and individuals.⁶² These convictions are central to the field’s willingness to shrug off legal norms as almost irrelevant to the justice of a private disputing process.

Take, for example, the construct that Professors Lela Love and Jonathan Hyman adopt in their poetically titled article, *What if Portia Were a Mediator?*.⁶³ In that piece, Love and Hyman posit that in an adjudicatory system, we define justice as the impartial application of “properly created standards or rules to ‘facts’ as determined by the adjudicator.”⁶⁴ Justice inheres in the source of the laws (democratically elected legislators and properly appointed judges) and their neutral and consistent application. Mediation, they write, works with a different definition of justice—“justice-from-below.”⁶⁵ This type of justice emanates from the parties themselves and emerges from their good faith participation in the process.⁶⁶ What is most important is that “the mediated outcome rest easy with parties’ values, principles, and interests, addressing their needs—psychological, moral, and practical—as they judge those needs to be.”⁶⁷

⁶⁰ Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 CARDOZO J. CONFLICT RESOL. 213, 217 (2005).

⁶¹ *Id.* See CHRISTINE PARKER, JUST LAWYERS; REGULATION AND ACCESS TO JUSTICE 31 (1999) (arguing that the application of legal principles to a set of facts may not result in substantive justice because the law itself is coercive and power may determine outcomes).

⁶² See *id.* at 215–18. See also Carrie J. Menkel-Meadow, *Remembrance of Things Past: The Role of Past to Future in Pursuing Justice in Mediation*, 5 CARDOZO J. CONFLICT RESOL. 97 (2004).

⁶³ Jonathan M. Hyman & Lela P. Love, *If Portia Were a Mediator: An Inquiry into Justice in Mediation*, 9 CLINICAL L. REV. 157, 160–61 (2002).

⁶⁴ *Id.* at 160.

⁶⁵ *Id.* at 162.

⁶⁶ *Id.* at 164.

⁶⁷ ELLEN WALDMAN, MEDIATION ETHICS: CASES AND COMMENTARIES 137 (2011).

As others have noted,⁶⁸ the mediation field takes seriously the postmodern inquiry into the knowability of “objective” facts and values, asking, “[i]s there really any there.”⁶⁹ Professor Carrie Menkel-Meadow, in her article, *The Trouble with the Adversary System in a Postmodern, Multicultural World*,⁷⁰ explicitly links postmodern explorations into the provisional and layered nature of truth with alternative dispute resolution’s rejection of rigid binary thinking and openness to multiple stories, perspectives, and possibilities.⁷¹ She connects the deconstruction of literary texts with the recognition that partisan “authors” with interests of their own construct judicial opinions.⁷² And, she weaves together postmodern anxieties regarding the existence of a unitary interpretive self with mediation’s choice to bypass the central authority of the courts in favor of the parties’ autodidactic construction of remedial options.⁷³ As Menkel-Meadow notes, postmodernism throws up a basic challenge to traditional legal authorities and methods in its insistence that we may lack the epistemological tools to evaluate anything. In the wake of Derrida, Foucault, Lyotard and their assault on Enlightenment rationality,⁷⁴ mediation’s turn away from authoritative enunciations of justice in favor of multiple shifting iterations of “what can work” seems both unsurprising and inevitable.

To sum up, then, if traditional understandings of justice involve the application of universal public values to a readily verifiable fixed set of facts, mediation theorists question the existence and reliability of both values and facts. Retreating from any substantive conception of justice, theorists have instead focused on pure process. Ethics in the mediation realm is thus largely a matter of identifying the conditions most likely to give effect to party voice and deliberation and restraining mediators from distorting the process with their own substantive preferences. If those conditions and restraints are in place, it is assumed the resulting outcome will be just.⁷⁵

⁶⁸ Amy J. Cohen & Michal Alberstein, *Progressive Constitutionalism and Alternative Movements in Law*, 72 OHIO ST. L. J. 1083 (2011).

⁶⁹ With apologies to Gertrude Stein. See GERTRUDE STEIN, *EVERYBODY’S AUTOBIOGRAPHY* 289 (1937).

⁷⁰ Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

⁷¹ *Id.* at 6, 13.

⁷² *Id.* at 20–21.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See Stulberg, *supra* note 60, at 222–23, 227–28 (arguing that mediators can “build conditions or constraints into the conception of the mediation procedure that minimize” injustice including voluntariness, inalienability of interests, publicity of outcomes, dignity and respect, informed decision-making, and toleration of conflicting fundamental

To borrow from John Rawls' vocabulary, the claim is that mediation presents a system of "pure procedural justice," a system where no independent criterion exists to ascertain the "right result" other than the criterion that the proper process has been followed.⁷⁶ It is only a few "justice contrarians"—the authors included—who continue to object that in many instances, social and legal norms serve as valuable external criterion by which mediated outcomes can and should be assessed.⁷⁷ In the next section, we review five ethics codes from around the world and note the lack of consensus on the relationship between mediation and questions of substantive justice and the role of the mediator in ensuring outcome-fairness.

IV. CODES FROM AROUND THE WORLD—DOES SUBSTANTIVE FAIRNESS MATTER?

Sidestepping the question of what a content-full notion of substantive justice might require, mediation's ethics codes work mainly toward fulfilling Rawls' criteria for pure procedural justice: the creation of a "scheme of cooperation" such that any result emanating from that cooperation can be said to be fair.⁷⁸ In Rawls' schema, equality of opportunity is a central condition for the creation of societal institutions that provide pure procedural justice. For mediators, maximal party autonomy and the absence of untoward mediator influence are essential conditions for a process that will produce just outcomes. Following deontologist Immanuel Kant's dictum that individuals should not be treated merely as means to other's ends, but as

values). Most mediation theorists agree with Professor Stulberg that—with certain process safeguards—mediation is a system of "pure procedural justice"—a process where importing external criterion to assess the substantive fairness of the outcomes reached is not only unnecessary, but unwise. *But see* Lola Akin Ojelabi, *Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice*, 31 CIV. JUST. Q. 318, 324–29 (2012) (arguing that mediation does not fit neatly into any of Rawls' categories of procedural justice).

⁷⁶ See JOHN RAWLS, A THEORY OF JUSTICE 85 (1971).

⁷⁷ Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997); *See* WALDMAN, *supra* note 67, at 124–30 (arguing that there are three approaches to consideration of norms in the mediation field: the norm-generating, norm-advocating, and the norm educating models); Lola Akin Ojelabi, *Mediation and Justice: An Australian Perspective Using Rawls' Categories of Procedural Justice*, 31 CIV. JUST. Q. 318, 335–39 (2012) (arguing that there is a need for objective standards by which to evaluate substantive justice in mediation, and that legal norms may be useful in this regard).

⁷⁸ RAWLS, *supra* note 76, at 88.

ends unto themselves,⁷⁹ the bedrock ethical commandment for mediators is to respect parties as the primary decision-makers, not as conduits of information for other decision-makers. The ethics codes that we review emphasize the mediator's duty to ensure procedural justice, while leaving the question of outcome fairness and substantive justice very much in the shadows.

A. The Definition of Mediation

Most codes of conduct define mediation as involving a third party who facilitates a conversation between the parties in order to assist them in reaching a settlement of issues in dispute between them. The *Australian National Mediator Accreditation Scheme* (NMAS) practice standards define mediation as a process in which the participants, with the support of a mediator, identify issues, develop options, consider alternatives and make decisions about the future actions and outcomes.⁸⁰ The purpose of mediation, according to this code, is to maximize the participants' decision-making.⁸¹ It is the parties' responsibility to resolve the dispute based on mutual terms. The role of the mediator is to "support" the parties to make their *own* decision.⁸² The mediator assists the parties to identify issues, generate options, consider alternative processes, and reach an agreement.⁸³ These

⁷⁹ IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Allen W. Wood ed., Yale Univ. Press 2002) (1785) (cited in GORDON GRAHAM, *EIGHT THEORIES OF ETHICS*, 115 (Routledge, Taylor & Francis Group 2004)).

⁸⁰ NAT'L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 2; PRACTICE STANDARDS § 2 (MEDIATORS STANDARD BOARD 2012). The analyses in this paper are based on the Australian Standards applicable until June 2015. A revised Standards came into effect after July 1, 2015. Where relevant, this paper will identify differences between the old and new standards and how that might change the argument presented. The definition in the 2015 Standards is similar and promotes party self-determination. See NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.2 (MEDIATORS STANDARD BOARD 2015).

⁸¹ NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.5 (MEDIATORS STANDARD BOARD 2012). Under the 2015 NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.1, a mediator assists "participants to make their own decisions"

⁸² NAT'L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 2.1 (MEDIATORS STANDARD BOARD 2012).

⁸³ NAT'L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 2.2 (MEDIATORS STANDARD BOARD 2012); NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.4 (MEDIATORS STANDARD BOARD 2012); NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.2 (MEDIATORS STANDARD BOARD 2015).

Standards describe mediation as primarily facilitative—not advisory, evaluative, or determinative.⁸⁴

Similarly, the U.S. Model Standards for Mediators define mediation as “a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to the dispute.”⁸⁵ The Model Standards explicitly warn against undermining party self-determination for reasons “such as higher settlement rates, egos, increased fees, or outside pressures”⁸⁶ The International Mediation Institute (IMI) Code of Professional Conduct defines mediation as “a process where two or more parties appoint a third-party neutral (‘Mediator’) to help them in a non-binding dialog to resolve a dispute and/or to conclude the terms of an agreement.”⁸⁷ As in the U.S. and Australian codes, the IMI definition clarifies that the parties are engaged in a dialogue that, without more, has no legal effect and that the mediator is in a secondary, supportive role.

Mediation, according to the European Code of Conduct for Mediators, “means any structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a third person.”⁸⁸ Once again, the definition makes clear that the mediator enters the process to assist the parties who remain the primary actors and decision-makers.⁸⁹

The definition of mediation is not outlined in the Singapore Mediation Code of Conduct. However, on its website, the goal of mediation is described as finding “a practical solution and settlement that is acceptable to all involved” and that the “[k]ey to mediation is that parties make their own decisions, often with the help of their lawyers. They are in complete control

⁸⁴ NAT’L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 2.3 (MEDIATORS STANDARD BOARD 2012). This particular description of mediation does not appear in the revised 2015 Standards, but it stipulates that a “mediator does not evaluate or advise on the merits of, or determine the outcomes of, disputes” except when using a “blended process” with the parties’ consent. NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS §§ 2.2, 10.2 (MEDIATORS STANDARD BOARD 2015).

⁸⁵ MODEL STANDARDS OF CONDUCT FOR MEDIATORS Preamble (AM. BAR ASS’N 2005).

⁸⁶ MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard (I)(B) (AM. BAR ASS’N 2005).

⁸⁷ CODE OF PROF’L CONDUCT Definitions (INT’L MEDIATION INST.). <https://imimediation.org/imi-code-of-professional-conduct> (last visited Feb. 22, 2016).

⁸⁸ EUROPEAN CODE OF CONDUCT FOR MEDIATORS Introductory Statement (EUR. COMMISSION 2004).

⁸⁹ *Id.*

of the outcome and do not run the risk of having an unfavorable decision imposed upon them by a judge or arbitrator.”⁹⁰ Obviously, party self-determination lies at the core of the Singapore Mediation Center’s practices as well as its presentation to consumers.

The Professional Mediators’ Association (PMA) Members’ Code of Conduct and Practice Standards direct mediators “to conduct mediation based on the principle of party self-determination and informed choice.”⁹¹ Mediators are required to “respect, value and encourage the ability of each participant to make individual decisions.”⁹² Overall, the definitions indicate a preference for party self-determination and autonomy in decision-making.

B. *The Role of Mediators*

One way to ensure that party autonomy receives full expression is to limit the scope of the mediator’s role in order to reduce, as far as it is possible, incursions on party self-determination. Each of the codes surveyed contains requirements that the mediator conduct herself in impartial fashion, favoring neither a particular party over the other nor any particular outcome over another. Additionally, mediators are limited in the sort of information they can provide and the ways that they provide it.

The Australian NMAS provides that the mediator is not to give advice, evaluate, or determine the dispute unless utilizing a “blended process,” which involves different forms of evaluation, is more directive, and is used with the parties’ consent.⁹³ Acknowledging that parties may request information during the course of negotiations, the Standards urge mediators to encourage parties to seek information and advice from outside professionals. If parties do look to the mediator for “expert information,” this information may be provided if it falls within the mediator’s particular competence, is couched in general terms, and delivered in non-prescriptive fashion. While informed consent is critical to party decision-making, the mediator is not responsible for ensuring that parties obtain relevant information and must not provide legal advice.

⁹⁰ See SINGAPORE MEDIATION CENTRE, *Mediation as a Stance*, <http://www.mediation.com.sg/about-us/#mediation-as-a-stance> (last visited Feb. 22, 2016).

⁹¹ MEMBERS’ CODE OF CONDUCT AND PRACTICE STANDARDS AND COMMENTARY § 1 (PROF’L MEDIATORS’ ASS’N 2012).

⁹² *Id.*

⁹³ NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 2.5, (MEDIATORS STANDARD BOARD 2012). See also NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS §§ 2.2, 10.2 (MEDIATORS STANDARD BOARD 2015).

The U.S. Model Standards mirror the Australian Standards in a number of respects. They also emphasize that parties should make “free and informed choices as to process and outcome” and similarly absolve mediators from serving as the guarantor of informed consent.⁹⁴ Like the Australian Standards, the Model Standards suggest that when parties are in need of information, the first line of response is to suggest recourse to outside professionals.⁹⁵ Where the mediator chooses to provide information to parties, she must ensure it is within her area of expertise and remember that doing so poses risks. The Model Standards contain the warning that, “The role of a mediator differs substantially from other professional roles. Mixing the role of a mediator and the role of another profession”—say, for example, that of a lawyer—“is problematic and thus, a mediator should distinguish between the roles.”⁹⁶ Although little explicitly is said, the Model Standards make clear that mediators should be wary of providing information and must be conscious that doing so may undermine the process’ overall goals of nurturing party self-determination.⁹⁷

The IMI Code is silent on the mediator’s role in providing or refraining from providing relevant information or advice. Rather, the Code addresses only the mediator’s obligation to ensure parties “have the opportunity to . . . obtain legal or other counsel before any final resolution.”⁹⁸ Whether or not the parties do in fact seek counsel, the mediator must be satisfied that the parties “knowingly consent” to any resolution reached.⁹⁹ The Code, then, assumes the importance of informed consent, but does not delve into the question of how the parties are to obtain the information they will need to make knowing and informed decisions.

The Singapore Mediation Centre’s Mediation Service Code of Conduct provides that, “The mediator will not evaluate the parties’ case unless requested by all parties to do so, and unless he is satisfied that he is able to make such an evaluation.”¹⁰⁰ The PMA Members’ Code of Conduct prohibits the mediator from providing “participants with legal advice, therapy,

⁹⁴ See MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard (I)(A)(2) (AM. BAR ASS’N 2005) (“A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions.”).

⁹⁵ *Id.*

⁹⁶ *Id.* at Standard (VI)(A)(5).

⁹⁷ *Id.* at Standard (I)(A)(1).

⁹⁸ CODE OF PROF’L CONDUCT § 3.2.2 (INT’L MEDIATION INST.), <https://imimediation.org/imi-code-of-professional-conduct> (last visited Feb. 22, 2016).

⁹⁹ CODE OF PROF’L CONDUCT § 3.2.3 (INT’L MEDIATION INST.), <https://imimediation.org/imi-code-of-professional-conduct> (last visited Feb. 22, 2016).

¹⁰⁰ MEDIATION SERV. CODE OF CONDUCT § 8.1 (SING. MEDIATION CTR. 2013).

counselling, or other professional services during the mediation.”¹⁰¹ Additionally, it follows the common approach of suggesting the mediator be an informed consent cheerleader or watchdog, while not specifying exactly what role the mediator can or should play in the provision of necessary information.

It is obvious that the codes we have surveyed tend to follow a similar path. They place party autonomy at the center of the process. They state that mediation should aim toward agreements that reflect the parties’ voluntary and informed consent, but are vague as to how the parties are to obtain the information that would render their consent truly informed. They suggest that mediators should urge parties to get the information they need from outside parties. If the parties choose not to do so, the codes provide a pathway for those mediators inclined to provide information themselves. However, the codes offer several cautions and make clear that a mediator who provides information does so at his or her own peril. If the mediator veers toward the provision of information so specific it could be interpreted as advice, then that practitioner has stepped over the line.

C. Procedural and Substantive Justice

Virtually every mediation code in existence, including the ones surveyed here, pay obeisance to the requisites of procedural justice. Affording parties equal time to speak and to be heard and treating parties with respect are standard fixtures in most mediation codes and align with the common mediation view that, if sufficient attention is paid to process, the resulting agreement will be substantively fair. Some mediation codes, however, adopt a somewhat paradoxical stance. They emphasize procedural justice and caution against excessive mediator influence. Yet, almost as a backdoor gesture, these same codes ask the mediator to be the last backstop against errant substantive injustice. While issuing no definite injunction, they allow the mediator to terminate the process if one party acts unconscionably or if an unconscionable agreement appears likely. Thus, while code authors are concerned that mediators not dominate or usurp party discussions, they remain uncomfortable with the threat that power imbalances, or other antecedent inequities, will turn the mediation setting into one of exploitation and abuse.

The U.S. Model Standards and the PMA Code illustrate the “pure procedural justice” approach where no mention is made of substantive

¹⁰¹ MEMBERS’ CODE OF CONDUCT AND PRACTICE STANDARDS AND COMMENTARY §5 (PROF’L MEDIATORS’ ASS’N 2012).

justice. Standard VI of the U.S. Code, which is devoted to “Quality of the Process,” directs the mediator to conduct the process “in a manner that promotes . . . procedural fairness,” but makes no mention of fairness of the outcome.¹⁰² A mediator has the option of withdrawing if the mediation is being used to further criminal conduct, if there is violence between the parties, or if the mediator feels she cannot remain impartial, but there is no option for withdrawal where the agreement appears to the mediator to be substantively unfair.¹⁰³ An omnibus direction exists for the mediator to “take appropriate steps,” including possible withdrawal if the mediator believes that participant conduct “jeopardizes conducting a mediation consistent with these Standards,” but since the Standards set no ceiling or floor with regard to the terms of resulting agreements, it would appear that this provision relates to procedural matters only.¹⁰⁴ The PMA tracks the U.S. Standards, except it includes an additional warning for the mediator who might be tempted to apply external criterion to the parties’ discussions, cautioning that “the mediator must respect the culture, beliefs, rights and autonomy of the participants and should defer their own views to those of the participants”¹⁰⁵

The more ambivalent aspects of the Australian, IMI, EU, and Singapore codes are salient upon quick perusal. The Australian code, for example, contains an entire section on procedural fairness¹⁰⁶ and cautions the mediator against evaluating outcomes reached by the probable “litigated outcomes.”¹⁰⁷

¹⁰² MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VI(A) (AM. BAR ASS’N 2005).

¹⁰³ *Id.* at Standard VI(A), II(C).

¹⁰⁴ *Id.* at Standard VI(C).

¹⁰⁵ MEMBERS’ CODE OF CONDUCT AND PRACTICE STANDARDS AND COMMENTARY § 1 (PROF’L MEDIATORS’ ASS’N 2012).

¹⁰⁶ NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 9 (MEDIATORS STANDARD BOARD 2012) (“A mediator will support the participants to reach any agreement freely, voluntarily, without undue influence, and on the basis of informed consent,” which will ensure that parties have the opportunity to speak and be heard, support balanced negotiation, refrain from pressuring parties to reach an agreement and encourage parties to obtain independent professional advice). *See* NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 7.4 (MEDIATORS STANDARD BOARD 2015) (a similar provision in the 2015 Standards). *See also* NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS §§ 7.6, 8.5 (MEDIATORS STANDARD BOARD 2015) (provisions related to seeking professional advice; the 2015 standards do not contain any provision directed at the mediator pressuring parties to reach an agreement).

¹⁰⁷ NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 9.7 (MEDIATORS STANDARD BOARD 2012). *See* NAT’L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS §§ 7.7, 10.1 (MEDIATORS STANDARD BOARD 2015) (the 2015 standards do not specifically outlaw consideration of probable litigated results; they provide that the

Although it does note that a mediator should support the parties in assessing the practicality and feasibility of any possible agreement, that assessment must be done according to the parties' subjective understandings of fairness.¹⁰⁸ One might interpret this language to mean that any societal consensus as embodied in legal rights and entitlements are secondary to the parties' own ideas and thus, not relevant to the process. At the same time, the code does contain language that could be read to the contrary. The code states that when assessing a proposed agreement's feasibility, the interests of "vulnerable stakeholders" should be considered.¹⁰⁹ An entire provision devoted to power imbalances requires mediators be trained to spot situations where the bargaining table is dangerously uneven and be alert to instances of subtle threat and intimidation.¹¹⁰ When discussing mediator competence, the code requires training in the ethics of assuring "fairness and equity"¹¹¹ and when discussing the mediator's limited role as information-provider, the code suggests it is appropriate in some disputes for the mediator to turn attention to a proposed solution's impact on absent third party

mediator must "encourage and support negotiations that focus on the participants' respective interests, issues and underlying needs and must encourage participants to assess any proposed agreements accordingly and with reference to their long-term viability.").

¹⁰⁸ NAT'L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 9.7 (MEDIATORS STANDARD BOARD 2012). For a somewhat similar provision in the 2015 Standards, see NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 7.7 (MEDIATORS STANDARD BOARD 2015). Under the 2015 provisions, the mediator is to encourage parties to make assessments based on their needs, interests, issues and viability of any agreement.

¹⁰⁹ NAT'L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 9.7 (MEDIATORS STANDARD BOARD 2012). See NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 8.4 (MEDIATORS STANDARD BOARD 2015).

¹¹⁰ NAT'L MEDIATOR ACCREDITATION SYS. APPROVAL STANDARDS § 5 (MEDIATORS STANDARD BOARD 2012). See NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS §§ 6.1, 10.1 (MEDIATORS STANDARD BOARD 2015) (the 2015 Standards provide that the "mediator must be alert to changing balances of power in mediation and manage the mediation accordingly" and must have knowledge of "the nature of conflict, including the dynamics of power and violence" and must have the "ability to manage high emotion, power imbalances, impasses and violence.").

¹¹¹ NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 7.3(c) (MEDIATORS STANDARD BOARD 2012). See NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 10.1(c)(v) (MEDIATORS STANDARD BOARD 2015) (the 2015 Standards differs slightly by requiring the mediator to have an understanding of the ethical principles in relation to "procedural fairness and equity in mediation including withdrawing from or terminating the mediation process.").

stakeholders.¹¹² Most importantly, when discussing termination of the process, the code states that the mediator may terminate when, in the judgment of the mediator, the parties are reaching a substantively unconscionable agreement.¹¹³ Thus, despite the code's significant emphasis on mediator self-restraint, it ultimately places the mediator in the role of backstop, a final bulwark against the exploitation of the unwary by more knowledgeable and perhaps unscrupulous bargainers.

The IMI Code of Professional Conduct is similarly mysterious regarding the mediator's relationship to the substantive fairness of the mediation agreement. On the one hand, the focus of the code appears initially to lie with questions of procedural fairness. One section entitled "Fairness and Integrity of the [P]rocess" requires the mediator to "conduct the process with fairness to all parties."¹¹⁴ This requirement is further explained as ensuring the parties have an opportunity to be heard, be involved in the process, and consult with legal counsel.¹¹⁵ However, there is no corollary requirement that mediators attend to the terms of the agreement being discussed. However, the Code does vest the mediator with some duties of assessment in a provision discussing termination of the process. Like the Australian Code, the IMI Code provides that the mediator "may withdraw from a mediation if a negotiation among the parties assumes a character that to the mediator appears unconscionable or illegal."¹¹⁶ Obviously, this last provision vests the mediator with the authority—and the burden—to determine when

¹¹² NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 10.4 (MEDIATORS STANDARD BOARD 2012). See NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 8.4 (MEDIATORS STANDARD BOARD 2015).

¹¹³ NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 11.3 (MEDIATORS STANDARD BOARD 2012). This provision is not included in the 2015 Standards. Circumstances under which a mediator may suspend or terminate include "if they form the view that the mediation is no longer suitable or productive." This will include where a participant "is unable or unwilling to participate," "is misusing the mediation," "is not engaging in the mediation in good faith," and where the "safety of one or more participants may be at risk." However, these are examples only and the list is non-exhaustive. See NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 5.1 (MEDIATORS STANDARD BOARD 2015). The provision in the 2015 standards that comes closest to speaking to outcome fairness is the one that requires the mediator to demonstrate ethical understanding in relation to procedural fairness and equity in mediation. This provision may be interpreted broadly to include equity in relation to the outcome of the mediation. See NAT'L MEDIATOR ACCREDITATION SYS. PRACTICE STANDARDS § 10.1(c)(v) (MEDIATORS STANDARD BOARD 2015).

¹¹⁴ CODE OF PROF'L CONDUCT § 3.2.2 (INT'L MEDIATION INST.), <https://imimediation.org/imi-code-of-professional-conduct> (last visited Feb. 22, 2016).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

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suspension, termination, or withdrawal is necessary based on an evaluation of the possible outcome as substantively unfair or inequitable.

The EU Code of Conduct for Mediators appears designed to sensitize mediators to the threat of substantive unfairness, but provides little guidance regarding the mediator's role in preventing it. It notes helpfully that mediators should conduct the process "appropriately," keeping in mind the possible existence of power imbalances and the rule of law as well as the parties' possible desire to end the dispute quickly without affording themselves of all the protections that an adversary procedure might allow.¹¹⁷ "Process fairness" in this code means that each party will have an opportunity to speak and the mediator *may* terminate the discussions if the agreement reached appears illegal or unenforceable.¹¹⁸ It is notable that the last provision relating to termination places the mediator in the position of evaluating the outcome-fairness of the agreement reached, a position of critique or judgment that the remainder of the code provisions explicitly warns against. The Singapore Mediation Centre's Code of Conduct similarly does not explicitly hold the mediator responsible for the substantive fairness of any agreement reached. But, it does allow the mediator to terminate the mediation if "any of the parties acts unconscionably," thus suggesting that a mediator who brings her own assessments of what constitutes unconscionable behavior into the parties' dispute is nonetheless acting appropriately and within the bounds of ethical mediator behavior.¹¹⁹

The codes we have surveyed reflect the vast majority of mediation ethics standards; they require mediators attend diligently to the requisites of procedural justice, but make few or no references to the substantive justice of the resulting agreement. Codes that do address the fairness of the mediation outcome do so in the context of terminating the mediation agreement. Some codes require the mediator to terminate the process if the resulting agreement is illegal, unfair, or unconscionable. Others simply raise termination as an option that remains at the mediator's discretion. These termination provisions suggest that the mediator can, and in some instances should, subject the proposed agreement to an assessment based on criteria that differ from the parties' own preferences.

¹¹⁷ EUROPEAN CODE OF CONDUCT FOR MEDIATORS § 3.2, http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf (last visited Feb. 22, 2016).

¹¹⁸ *Id.*

¹¹⁹ MEDIATION SERV. CODE OF CONDUCT § 6.2(b) (SING. MEDIATION CTR. 2013), <http://www.intracen.org/Code-of-Conduct-Singapore-Mediation-Centre/#sthash.0bIXhS58.dpuf>.

We applaud these provisions. We think that they represent a positive development in the evolution of mediation's ethical canon. Nevertheless, the provisions also reveal a central tension within the codes. If a mediator's only ethical responsibility is to respect party autonomy and remain impartial, then, arguably, the mediator should not be assessing the fairness, legality, or unconscionability of the parties' proposed agreement. What these termination provisions acknowledge is that sometimes mediation negotiations can lead to harmful or exploitative outcomes and that the mediator should be on the lookout for these disturbing outcomes, work to modify them, or seek to disassociate from them. Not every code contains these termination agreements, but those that do suggest a more layered and complex set of responsibilities for the mediator than do codes that focus exclusively on procedural fairness to the exclusion of other concerns. Although self-determination or party autonomy is a fundamental value of facilitative mediation, the codes, to cater for circumstances that may lead to unjust outcomes, are shifting from complete reification of self-determination to an acknowledgement that the mediator may have a role to play in protecting against gross exploitation or unfairness. The critiques that have dogged mediation from its earliest days acknowledge the threat that power imbalances and systematic inequities pose to a quality process. That literature of critique confronts directly what some mediation ethics codes hint at covertly—that the mediator has a role to play in ensuring that mediation agreements meet some sort of minimal threshold of justice—both for each party and for affected parties outside the mediation room. In our view, existing codes should formally recognize that self-determination and party autonomy are crucial, but not the single ethical basis for mediator's conduct.

Thus far, we have argued that the question of mediator accountability for ensuring minimal levels of substantive fairness has been the subject of inconclusive debate in the mediation literature. We have further argued that existing mediation codes either ignore the question of substantive justice altogether or speak to questions of justice with a divided tongue. In the next section, we argue that shifting from a purely Kantian to a Rawlsian view of justice helps clarify and support our argument that substantive justice can and should become part of the mediation ethics canon.

V. A RAWLSIAN APPROACH TO MEDIATION ETHICS

John Rawls, arguably the most important political philosopher of the twentieth century, was a social contract theorist who sought to develop a theory of justice that functioned as an alternative to utilitarianism.¹²⁰ Utilitarians, as Rawls explained, define right action as that which creates the greatest happiness for the greatest number. Morality becomes a question of maximizing happiness, while the dilemma of happiness distribution is put aside.¹²¹ One man of ten may be enslaved to tend to the needs of the other nine and the action would be “right” so long as the happiness of the nine free men exceeds the unhappiness of the one slave.

Rawls rejected this account and instead proposed a vision of right action that moves questions of distributional equity front and center. Rawls’ theory is crucially concerned with the appropriate division of social advantages and is devised to answer the question: [H]ow do we arrive at a just allocation of social goods in the face of competing claims? Rawls suggests that the answer can be arrived at procedurally by devising a social contract that members enter into while situated in what Rawls terms “the original position” operating behind the “veil of ignorance.”¹²²

The original position, it must be understood, is not an actual status or ranking in society. It is instead a “purely hypothetical situation characterized so as to lead to a certain conception of justice.”¹²³ Operating behind a veil of ignorance, individuals in this position have no idea what status they occupy in society. They are ignorant of their social class, gender, and educational level. They do not know if they are born into affluence or poverty, if their dad is a janitor or hedge fund partner, if they are handsome or homely, able-bodied or disabled.¹²⁴ Indeed, in the original position, people are unaware of their strengths and weakness. They are unaware of “[their] conception of the good . . . the special features of [their] psychology such as . . . aversion to risk or liability to optimism or pessimism.”¹²⁵ The parties, however, are aware of “the circumstances of justice and whatever this implies.”¹²⁶ These circumstances are those in which a moderate scarcity of resources exists warranting redistribution to everyone’s advantage.¹²⁷

¹²⁰ RAWLS, *supra* note 76, at 22.

¹²¹ *Id.* at 26.

¹²² *Id.*

¹²³ *Id.* at 12.

¹²⁴ *Id.* at 12, 137.

¹²⁵ *Id.* at 137.

¹²⁶ *Id.*

¹²⁷ *Id.*

Rawls assumes that the individuals placed behind the veil of ignorance are rational, self-interested decision makers. That is, all things being equal, Rawls' decision-makers "would prefer more primary social goods rather than less. [They would] . . . seek to protect their liberties, widen their opportunities . . . and enlarge their means for promoting their aims, whatever they are."¹²⁸ However, standing in the original position with no knowledge of where they are situated in the social hierarchy, these individuals have every incentive to devise rules of engagement that are mutually beneficial to all ages, genders, socioeconomic classes, cultures, and ethnicities since it is unclear to which community, class, or affiliation they will belong. Working with this construct, Rawls hypothesized that decision-makers would cooperatively embrace the "difference principle," a distributive principle that "social and economic inequalities are to be arranged so that they are . . . to the greatest benefit of the least advantaged."¹²⁹

It is important to recognize that Rawls was bent on pursuing an object quite different from the construction of ethical standards in mediation. Rawls was interested in defending a theory of social governance and devising methods for the distribution of social advantages under conditions of moderate scarcity. He was concerned with societal institutions writ large, not with how individuals work out their disputes in private settings. Nonetheless, to the degree that Rawls sought to identify a method that would yield a just ordering of social institutions, his ideas can be usefully transposed to the project of identifying which set of ethical mandates will yield just outcomes in mediation.

Let us place a mediation party in the original position for a moment and wrap her in the veil of ignorance. She does not know her status in society. She does not know the nature of her dispute. She does not know whether she has the money or practical understanding to hire a legal representative. She does not know whether she is articulate or nearly mute, assertive or shy, in perfect mental health or suffering from trauma. She does not know with whom she is disputing, whether it is another individual or a large corporation. She does not know the extent of the resources the other party brings to bear on the mediation and she does not know whether the other side

¹²⁸ *Id.* at 142-43.

¹²⁹ *Id.* at 266 ("Social and economic inequalities are to be arranged so that they are both:

- (a) To the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) Attached to offices and positions open to all under conditions of fair equality of opportunity.").

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is telling the truth, operating in good faith, or using the mediation process for unscrupulous ends.

While secluded from any information about her personal circumstances that might bias her answer, we then ask the following: What sort of ethical responsibility do you think your mediator should assume when considering questions of justice? You have choices. You could limit your mediator's responsibilities to matters of procedure. That would mean that the mediator would have a responsibility for ensuring that you and your representatives have many opportunities to speak and be heard. Additionally, the mediator would have the responsibility to conduct the mediation with impartiality, favoring neither you nor your adversary and treating each of you with consideration and respect. If the mediator felt that you did not understand the goals and methods of the mediation process or the issues under discussion, she would be required to halt or terminate the discussion. In a purely procedural conception of justice, this would be the extent of the mediator's responsibilities.

Alternatively, you could impose upon the mediator an additional obligation. You could include within the mediator's ethical code an obligation to attend to the substantive fairness of the resulting agreement. You could make this requirement as stringent or as elastic as you like. You could specify simply that the mediation agreement should avoid terms that could be characterized as unconscionable, exploitative, or abusive to one or more parties. Alternatively, you could prohibit the mediator from assessing the substantive fairness of the mediation agreement in any way and include this prohibition in ethical codes of conduct. Your choice.

What choice would you make if you did not know what internal capabilities or external resources you could bring to the mediation process? What choice would you make if you thought it possible that you might be the weakest party in the room? Would you be confident that the procedural protections embedded in most mediation ethics codes would be sufficient to protect your interests or would you want the mediator to be sensitized to the possibilities of substantive justice and ethically authorized to raise substantive justice concerns if the circumstances warrant?

One can be certain that parties in the original position would be influenced by their circumstances to choose principles that will lead to everyone's advantage since each party would be ignorant about "his place in society, his class, position or social status . . . his fortune in the distribution of natural assets and abilities, his intelligence and strength."¹³⁰ The parties would choose principles that will benefit the vulnerable. The parties would

¹³⁰ *Id.* at 137.

consider that if they happened to be affluent, powerful parties, they would be in a position to obtain the best outcome from the process and any alternative processes. If, on the other hand, they turned out to be the vulnerable, they would hope for some assistance from the mediator and would urge the adoption of ethical codes that allow mediators latitude to intervene to prevent unjust outcomes.

Knowing that legal rights are safeguards for ensuring justice, parties in the original position would want to ensure those safeguards are promoted in mediation processes. This way, parties can be assured they would not be denied important legal rights in mediation.

It is our view that the more disadvantaged party would likely prefer to participate in a process where the mediator is charged with ensuring not simply fair procedures, but some basic minimal standard of substantive fairness. We believe that this charge would provide assurance to parties who feel unconfident, either in their own negotiation capacities or in the competence of counsel, if they are fortunate enough to be able to access representation. In taking this position, we are well aware of the counterarguments likely to be advanced by “pure proceduralists.” We address these in turn.

A. How can a mediator assess substantive justice when justice has no enduring content and represents mere subjective preferences?

The first likely response, emanating from the postmodernist camp, would be that expecting a mediator to assess substantive justice is incoherent because no absolute, stable notion of justice exists. Concepts of justice simply reflect subjective preference, and there is no justification for imposing a mediator’s subjective preference on the parties.

We have two responses to that objection. First, we acknowledge that concepts of what constitutes just treatment can vary with the individual. However, at more general levels, we believe that it is not difficult to gain consensus as to what constitutes an agreement so unbalanced that it should not be concluded under mediation’s auspices. For example, although reasonable people might disagree regarding the exact proper division of a working spouse’s pension at the termination of a long-term marriage, most would agree that a division that would leave either spouse in penury for the duration of their old age would be unconscionable. Similarly, twenty lawyers might each develop twenty different proposals for what a just conclusion to a landlord-tenant dispute might involve, but likely, all twenty of them would agree that a resolution that requires a tenant to continue paying rent throughout the winter for an apartment that has no heat or hot water is unjust. The point is that we are not charging the mediator with the task of

identifying the one permissible just resolution and trying to sell that to the parties. That would be problematic on any number of levels. Rather, we are proposing that the mediator remain alert to those few situations where a power imbalance in the mediation has led to a truly shocking and insupportable result. Acknowledging that cultural, political, and ideological commitments complicate efforts to identify content-full notions of justice to which we all subscribe, we are setting the bar for the mediator exceedingly low. We suggest the mediator disassociate herself from—and seek to dissuade the parties from binding themselves to—agreements that are unconscionable, that is, agreements that are so one-sided and unfair that they shock the conscience. By doing so, we believe the postmodern critique of justice's indeterminacy loses much of its power.

B. How can a mediator assess substantive justice when they lack the necessary expertise to do so?

This objection differs from the previous one. It assumes that there may be standards of justice to which we all might subscribe but posits that the mediator is ill-situated to determine how that standard should be applied in the dispute at hand. The mediator, it is argued, is ill-suited for two reasons. First, the mediator has no particular access to the standards as embodied in legal norms, governmental ruling, or the teachings of particular disciplines, such as engineering, psychology, or otherwise. The mediator is a process expert, not a subject matter expert. If the case involves intellectual property, child psychology, collective bargaining agreements, bridge engineering, or landlord-tenant law, the mediator is likely a generalist and not equipped to determine which rule, law, principle, or contractual provision should govern. Second, the mediator has insufficient access to the facts of the dispute such that she could make a reliable determination as to how the relevant standards apply in the parties' particular context. After all, many mediators receive no pre-mediation submissions, so all they know about the dispute is what the parties or their representatives reveal during the initial opening statement. There is nothing to prevent parties from selectively omitting unhelpful facts, and there is ample anecdotal evidence that parties do precisely that.

So what will be required of the mediator who is concerned about substantive justice? To answer this question, it is important to consider what this mediator is not being asked to do. The mediator is not being asked to wear a lawyer or a judge's hat; she is not expected to be knowledgeable about every discipline, trade, or subject matter. She is not being asked to steer parties to a particular outcome. Our argument assumes the desirability of leaving to the parties the choice of the precise terms and conditions of settlement. What we are asking is that the mediator be prepared to serve as

the last backstop against unfairness. What this means is that when the parties are moving toward a truly shocking outcome (which should be apparent to even the mediator who is neither an expert on the facts or law relating to the dispute), the mediator is prepared to raise with both the empowered and disempowered parties her concern with the possible negative effects that such an agreement might generate. In other words, where a conflict might resolve in one hundred possible ways, and ten of those possibilities would be unfair and exploitative for one of the parties, we would argue that the mediator should bring this to the attention of the parties. The mediator need not be an expert in either the law or the facts to identify the small percentage of options that fall beyond the pale.

C. How can a mediator, bound by the profession's codes and best practices to be impartial, have any obligations for outcome fairness?

A mediator who withholds her imprimatur from unconscionable arrangements will either be pushing the parties to consider less unbalanced terms or withdrawing in the face of seriously inequitable agreements. Either way, the mediator will be benefitting the party who would otherwise be binding herself to an agreement seriously skewed against her and withdrawing a benefit from the party who would gain from the imbalance. Won't this behaviour violate the mediator's duty of impartiality?

We think the only honest answer to this response is, "Yes." Advocating against extremely one-sided agreements or those that pose serious risks to absent third parties does require the mediator to stray from a stance of formal impartiality.¹³¹ If impartiality entails the absence of bias or partiality, not

¹³¹ See Susan Nauss Exon, *How Can a Mediator Be Both Impartial and Fair: Why Ethical Standards of Conduct Create Chaos for Mediators*, 2006 J. DISP. RESOL. 387 (2006) (arguing that mediators' ethical responsibilities sometimes conflict and that the Standards do not adequately address this issue); Michael T. Collatrella, *Informed Consent in Mediation: Promoting Pro Se Parties' Informed Settlement Choice While Honoring the Mediator's Ethical Duties*, 15 CARDOZO J. CONFLICT RESOL. 705 (2014) (arguing that mediators cannot maintain impartiality if they are required to ensure informed outcome consent). But see Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making*, 74 NOTRE DAME L. REV. 775 (1999) (arguing that the doctrine of informed consent in mediation ought to be more concretized in order to ensure fairness); Hilary Astor, *Mediator Neutrality: Making Sense of Theory and Practice*, 16(2) SOC. & LEGAL STUD. 221 (2007) (arguing that there is need for a new approach to neutrality in mediation—which makes sense in practice and in theory—suggesting a method of practice that requires (rather than outlaws) attention to power relationships); Susan Douglas, *Constructions of Neutrality in Mediation*, 23(2)

only with regard to the parties but with regard to outcomes,¹³² then resisting unconscionable outcomes obviously compromises this stance. This is the cost of asking the mediator to guard against unjust outcomes.¹³³ We think, though, that if the mediator approaches this task with humility, conscientiousness, and discretion, that the cost will be a small one.

Those who object to tasking the mediator with responsibility for minimal levels of outcome fairness imagine a highly interventionist mediator aggressively inserting him or herself into the parties' negotiations to shape an outcome that corresponds with his or her own unique vision of justice. But, mediators can work to avoid grossly unfair outcomes without unduly intruding on the parties' own negotiations. The mediator we imagine strives toward a noninterventionist stance and only inserts herself as a "fairness cheerleader" as a last resort when the bargaining process seems seriously askew. Even in that circumstance, the mediator will be sensitive to the possibility that the parties' idiosyncratic needs and interests may be influencing the decision to deviate from an agreement that more closely tracks expected legal outcomes. After discussing the advantages and disadvantages of approaches that more traditionally incorporate social or legal norms with parties, the mediator will, in the great majority of circumstances, concur with the parties' choices. It is only when the mediator suspects that one party has not adequately considered the long-term effect of the agreement on his or her best interests, or the outcome poses serious risks to absent stakeholders, that our mediator will continue as a dissenting voice and consider withdrawing from the mediation.

AUSTRALASIAN DISP. RESOL. J. 80–88 (2012) (discussing the Australian National Mediation Accreditation Scheme provisions in relation to neutrality and noting the tension between the requirement of impartiality and promoting fairness).

¹³² It is important to note, however, that asking the mediator to resist unjust outcomes in no way compromises the mediator's obligation to maintain an impartial stance vis-à-vis the parties. The Model Standards forbid the mediator from acting "with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, or performance at a mediation . . ." MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard (II)(B)(1) (AM. BAR ASS'N 2005) (a mediator may follow this injunction, while at the same time refusing to endorse outcomes that fall below a minimal fairness standard); RACHAEL FIELD, EXPLORING THE POTENTIAL OF CONTEXTUAL ETHICS IN MEDIATION (2008), *reprinted in* ALTERNATIVE PERSPECTIVES ON LAWYERS AND LEGAL ETHICS: REIMAGING THE PROFESSION 197 (Francesca Bartlett et al. eds., 2011) (exploring the potential of contextual ethics in mediation).

¹³³ See Shapira, *supra* note 6, at 28.

D. If your Rawlsian mediator is not telling the parties what is fair and what to do, how does your mediator differ from standard conceptions of the mediator role that task the mediator with responsibility for process fairness alone?

Perhaps the real difference between the functions of the Rawlsian mediator and standard conceptions is that the Rawlsian mediator functions more deliberately as a consciousness-raiser and a safety net. The Rawlsian mediator would begin her entry into the process consciously raising the parties' awareness about the importance of substantive justice in the mediation process. This discussion would begin in pre-mediation sessions. The mediator would emphasize that ensuring procedural justice falls squarely within the mediator's expertise and charge but that identifying what is substantively fair will require the parties to think deeply about their own values and that it is their responsibility to take steps to achieve fairness during negotiations. The Rawlsian mediator will reiterate the standard mediation script that the mediator is not responsible for determining who is right or wrong, who behaved well or badly, or how things should be made right. The mediator will point out, however, that the mediation process does strive toward just outcomes and that the parties will be called upon to formulate standards by which they, as individuals, would assess fairness. The standards may include legal, trade, professional, or individually devised criteria, whatever meets the parties' understandings of what justice in their own situation requires. Where a party lacks the capacity or resources to formulate justice standards, the mediator will encourage them to seek legal advice or the support of a third party. And, if both parties seek to use the mediator as an informational resource and the mediator is qualified to serve in this role, then the mediator may be the source of information that helps the parties elaborate upon their own intuitions of what justice requires in their own situation. With the mediator's help, the parties can generate fully fleshed out justice criteria that can then be applied to the options that each party has proposed for settlement. In sum, the mediator works to raise the parties' consciousness about the goals of the process in terms of the outcomes reached and encourages the parties to think deeply about the justice criteria they choose to employ.

The mediator's role as a safety net occurs toward the end of the process as the parties are narrowing in on the particular terms of agreement. The Rawlsian mediator has the responsibility for assuring that a proposed outcome or option is not so one-sided or disadvantageous to one party or absent third parties that it "shocks the conscience." The assessment of what is conscience shocking will be based both on the criteria the parties have

articulated as well as external societal standards that the mediator, if requested, will have shared with the parties.

VI. APPLICATION: AN ACTUAL CASE FOR THE RAWLSIAN MEDIATOR

Let us concretize the approach we imagine a Rawlsian mediator would take in a hypothetical case, the Tongan Slip and Fall.

You are mediating a slip-and-fall personal injury case. The plaintiff, a newly arrived immigrant from Tonga, was injured when he stopped into the defendant's convenience store to use the facilities on the way to a job interview. The defendant's cleaning crew had mopped the restroom area in the back of the store, but neglected to post a sign alerting shoppers that the floor was wet. The plaintiff suffered serious injuries, including permanent nerve damage, in the fall and has incurred significant medical debt because he has no health insurance. Defendant is arguing that the plaintiff was not a customer, and thus, they owed no duty to him to maintain the restroom in a dry, safe condition. The plaintiff speaks little English and cannot follow the proceedings. His attorney, a fellow Tongan who has been practicing law in the United States for only four months, appears to misunderstand the relevant legal doctrines on landowner liability that supply his client with compelling arguments for recovery. Because the plaintiff has no job and is concerned about paying some portion of his debt to the health care providers who serviced him, he is preparing to settle with the defendant store owner for 10 percent of what you believe to be a \$200,000 claim.¹³⁴

What would the Rawlsian mediator do?

The Rawlsian mediator would first note that there are several features of this mediation that suggest that a power imbalance exists between the plaintiff and the defendant and that the negotiation could very well lead to an agreement that "shocks the conscience" and does not serve the injured Tongan well in the long run. The Tongan plaintiff is vulnerable because he does not understand English well, does not know his entitlements under the law, and is represented by a lawyer who is also uninformed about the law applicable to his client's case. These facts have contributed to the willingness of the injured Tongan and his lawyer to accept a settlement figure, which

¹³⁴ WALDMAN, *supra* note 67, at 135.

falls far short of what a court of law might award. Procedurally, our plaintiff lacks sufficient information to reach an informed decision about his options and this procedural defect threatens to lead to an unjust outcome.

The mediator following a code developed from the original position will take some responsibility for ensuring substantive justice. This would mean that the mediator, from the onset, would have alerted parties to the importance of substantive justice and explained that this is primarily the responsibility of the parties, with the mediator serving as a “backstop” or safety net. The mediator would explain that the parties should make use of the opportunity provided in the process to deliberate over and discuss what they would consider a fair outcome and by what standards they would measure fairness. At the same time, the mediator would work to level the unequal playing field between the defendant landlord and the Tongan plaintiff and his lawyer by ensuring that the language gap is closed, endeavouring to ensure the plaintiff gains a fuller understanding of the legal rights he is waiving, and, if necessary, intervening if a party is about to agree to terms that fall far short of what is acceptable by societal standards.

The Rawlsian mediator will need to engage in a number of interventions designed to ensure that the Tongan plaintiff is informed about the array of options available to him. At a minimum, the plaintiff needs to understand the likelihood of obtaining a more substantial recovery in court and the barriers and hurdles that might impede such recovery. The mediator must be prepared to adjourn the process for the plaintiff to seek legal advice or assistance of a trusted family member or friend. The mediator must be prepared to intervene to ensure that the injured Tongan and his lawyer have fully assessed the risks and benefits of settlement versus the risks and possible benefits of continuing to litigate the claim. This would include asking the injured Tongan about the legal advice he has received and the lawyer about his awareness of the law in the area including the likely court outcome. The Rawlsian mediator will not advise the plaintiff either to settle, or demand more money, or exit the mediation and hire another lawyer. However, the Rawlsian mediator must, at a minimum, ensure that the plaintiff has thought about what for him constitutes a sufficiently adequate settlement, such that it is worth forgoing the possible gains that future disputing might bring. Asking questions, such as, “If you were confident that a judge would award more money to you in court, would you ask for more money here in mediation?” Or, “What sort of investigation of landowner responsibilities have you done prior to this mediation?” Or, “Do you think \$20,000 is going to be enough for you to pay your medical bills and get back on your feet after this injury?” These are all ways of pushing the plaintiff (and his lawyer) to think about what would be a substantively fair outcome and what role legal norms plays in that assessment.

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If, at the end of that intervention, the injured Tongan and his lawyer are still prepared to accept ten percent of a possible court outcome, the mediator would have to consider whether it would be appropriate to terminate or withdraw from the mediation on that basis. In our opinion, unless factors that render the process defective are present, the outcome is not so unfavorable that the mediation should feel duty-bound to withdraw. However, the mediator would have demonstrated her concern for the justness of the outcome and would have raised the consciousness of the parties as well.

VII. CONCLUSION

In this paper, we have explored the relevance of Rawls' theory of justice to mediation ethics, arguing that, given the rise of inequality in most parts of the world and the ascendancy of mediation as a popular and frequently adopted dispute resolution process, Rawls' theory of justice could form the basis of a revitalized mediation ethics. Mediation's relationship to social justice is both muddled and fraught. A rich body of literature critiques mediation as a regressive process impeding disadvantaged groups' access to justice, while mediation defenders reject rights-based notions of fairness and focus on the value of voice and autonomy in the disputing process. Ethics codes reflect this muddle, emphasizing both the importance of party self-determination and mediator impartiality, while, in some instances, suggesting that grossly one-sided agreements might require mediator intervention or withdrawal.

We have argued that importing Rawls' theory of justice into the canon of mediation ethics creates space for standards of conduct that honor party autonomy while taking seriously the obligation to care for and nurture substantive fairness in mediation outcomes. To flush out what such a code might look like, we borrowed Rawls' proposed method by which a fair social contract might be structured and adopted it to the mediation context. We placed a mediation party in the original position behind a veil of ignorance and asked: What sort of ethical responsibility do you think your mediator should assume when considering questions of justice? In our view, the ethical responsibilities would be those that lead to everyone's advantage by requiring the mediator to serve as a fairness cheerleader and safety net for parties about to agree to unconscionable terms.

We discussed a hypothetical situation based on Rawls' justice theory and addressed four anticipated criticisms. We clarified that while our intention is not to make mediators truth-finders, mediators should take some responsibility for identifying unconscionable terms in settlement agreements. Additionally, we noted that mediators need not be subject matter experts in all of the arenas in which they mediate but should be sufficiently familiar

with the topics in dispute to be able to spot potentially problematic settlement provisions; we suggested that mediators facilitate a discussion between the parties as to the social or legal norms by which they would want to assess the justice quality of generated options and serve as a safety net for a party about to sign off on an unfair agreement.

Rawls, as he elaborated upon the social contract that he thought would bring about a brave, more equitably constructed world, noted, "The natural distribution is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts."¹³⁵

People come into mediation in different positions. Some are rich, others poor. Some are educated, others not. Some have access to diligent, skilled legal assistance; others do not. These are the facts that mediators face. And, while mediators are not called into disputes to reshape the existing power topography—nor would they likely be invited back if they did—mediation, as an institution, must deal with the "natural distribution" of party resources in a just fashion. The impartial mediator must be granted some latitude to serve as fairness cheerleader and safety net when mediation outcomes veer toward the unconscionable. This paper is a beginning effort, using Rawls' theories as the launching pad to nudge our thinking about ethics in a direction that takes better account of the vast levels of inequality that permeate our modern day world—and the many disputes that roil it.

¹³⁵ RAWLS, *supra* note 76, at 102.